126

No. 08-820

Supreme Court, U.S.
FILED
APR 17 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DONALD W. BAIN, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY BRIEF

KENT A. SIMMONS
Attorney at Law
601 Brady Street, Suite 311
Davenport, Iowa 52803-5251
(563) 322-7784
(563) 323-9309 facsimile

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1) Whether the Eighth Circuit is circumventing the rule of *Rita* by presuming the sentencing judge correctly understood and applied the law, when the record plainly shows the judge misstated and misunderstood the rule?

2) Whether the Eighth Circuit is circumventing the rule of *Gall* by creating its own preservation of error requirement that disavows the force of Rule 51(b) of the Federal Rules of Criminal Procedure?

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES ii

ARGUMENT 1

1. THE EIGHTH CIRCUIT IS CIRCUMVENTING THE RULE OF *RITA* BY PRESUMING THE SENTENCING JUDGE CORRECTLY UNDERSTOOD AND APPLIED THE LAW, WHEN THE RECORD PLAINLY SHOWS THE JUDGE MISSTATED AND MISUNDERSTOOD THE RULE 1

2. THE EIGHTH CIRCUIT IS CIRCUMVENTING THE RULE OF *GALL* BY CREATING ITS OWN PRESERVATION OF ERROR REQUIREMENT THAT DISAVOWS THE FORCE OF RULE 51(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE 4

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Gall v. United States, 128 S. Ct. 586 (2007) 4, 5, 6, 7, 8

Nelson v. U.S., 129 S. Ct. 890 (2009) 1

Rita v. U.S., 127 S. Ct. 2456 (2007) 3, 7, 8

U.S. v. Bain, 537 F.3d 876 (8th Cir. 2008) 6

U.S. v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005) 5, 7

U.S. v. Nelson, 276 Fed. Appx. 331 (4th Cir. 2008) 1, 2

U.S. v. Vickers, 528 F.2d 1116 (8th Cir. 2008) 6

U.S. v. Vonner, 516 F.3d 382 (6th Cir. 2008) 4, 5, 7

Wingo v. Wedding, 418 U.S. 461, 94 S. Ct. 2842 (1974) 4

ARGUMENT

1. THE EIGHTH CIRCUIT IS CIRCUMVENTING THE RULE OF *RITA* BY PRESUMING THE SENTENCING JUDGE CORRECTLY UNDERSTOOD AND APPLIED THE LAW, WHEN THE RECORD PLAINLY SHOWS THE JUDGE MISSTATED AND MISUNDERSTOOD THE RULE.

The Government cites three cases from 2009, but it does not cite *Nelson v. U.S.*, 129 S. Ct. 890 (2009). It does not explain why it takes an about face from *Nelson* in the instant case. In *Nelson*, the Government had conceded the sentencing judge had improperly applied a presumption of reasonableness in imposing a sentence at the bottom of the Guidelines range. 129 S. Ct. at 892. In *Nelson*, the sentencing judge said, "that 'the guidelines are advisory but under the case law of the Fourth Circuit Court of Appeals . . . The Guidelines are considered presumptively reasonable . . . That means that unless there's a good reason in the factors that I just reviewed with you, the Guideline sentence is the reasonable sentence . . . '" *U.S. v. Nelson*, 276 Fed. Appx. 331, 333 (4th Cir. 2008).

In the instant case, Judge Jarvey said the same thing:

> [DEFENSE COUNSEL] . . . I urge the Court under the circumstances and the facts of this case and what is presented to the Court to impose a minimum mandatory 60 months.

> THE COURT: I can't do that. Hang on. In order to go below the Guidelines pursuant to 3553 which are viewed in the Eighth Circuit now as affirmed by the United States Supreme Court as presumptively reasonable, there's got to be a ground for a variance. (App. 29-30).

The Government did not cite *Nelson* in its brief herein because it is now saying Judge Jarvey did not improperly apply a presumption of reasonableness. The language is virtually identical to the judge's statement in *Nelson*. As in *Nelson*, Judge Jarvey then imposed the sentence at the bottom of the Guidelines range, but now the Government wants to defend the Eighth Circuit. The Government now refuses to concede the *Rita* violation, and says Judge Jarvey's statements "are most naturally read as simply acknowledging the *appellate* presumption of reasonableness." (Opp. Br. 8) (emphasis supplied). The Government does not explain why it conceded the *Nelson* sentencing judge's reference to the Fourth Circuit's presumption was impermissible, but now it "naturally" reads Judge Jarvey's reference to the Eighth Circuit's presumption as a legitimate reference to an appellate standard. Of course, a sentencing judge has no legitimate or logical reason to be discussing an inapplicable appellate standard in the course of a sentencing. Why has the Government abandoned the voice of reason it chose in conceding the error in *Nelson*?

The other key ingredient the Government leaves out of its analysis is the fact that Judge Jarvey did not merely make a simple reference to the presumption of reasonableness in passing. The judge clearly demonstrated he did *not* understand the presumption that had been approved in *Rita*. Judge Jarvey twice said that *Rita* stood for the proposition that the courts in the Eighth Circuit could presume the **Guidelines are reasonable**. (App. 29-30, 36). Of course *Rita* does not allow that presumption and such a presumption would completely preclude a sentencing judge's independent analysis of factors. The Government does not discuss this aspect of Judge Jarvey's erroneous reasoning because it would destroy the Eighth Circuit's presumption that the sentencing judge understood *Rita* and applied it correctly. Not only does the Government fail to address Judge Jarvey's misunderstanding of *Rita*, it also makes this plainly incorrect statement:

> Nothing in the record suggests that the sentencing court was swayed by a belief that the Guidelines range was presumptively reasonable. (Br. Opp. 9).

The foregoing statement surprisingly came just one page after the Government quoted Judge Jarvey's separate statements that the Guidelines are now "presumptively reasonable" and "the Sentencing Guidelines are presumed reasonable **here** in the Eighth Circuit Court of Appeals." (Br. Opp. 8) (emphasis added) (App. 29-30, 36).

2. THE EIGHTH CIRCUIT IS CIRCUMVENTING THE RULE OF *GALL* BY CREATING ITS OWN PRESERVATION OF ERROR REQUIREMENT THAT DISAVOWS THE FORCE OF RULE 51(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 51(b) of the Federal Rules of Criminal Procedure is stated very plainly. The two methods of preserving error are not separated by an "and" or even an "and/or." They are stated in the alternative "or." The rule does not restrict, nor prescribe, either alternative to certain situations or types of error. The Government has no answer for the fact a circuit court's adoption of a rule restricting the alternative methods is the adoption of a local rule that contravenes the rule Congress has approved in Rule 51(b). The Government does not address *Wingo v. Wedding,* 418 U.S. 461, 94 S. Ct. 2842 (1974) (Pet. 31).

The Government cites *U.S. v. Vonner*, 516 F.3d 382, 391 (6th Cir.), cert. den., 129 S. Ct. 68 (2008) for the very proposition that tore that *en banc* panel apart. The Government chooses to side with the judges of that panel that wanted to employ their own reading of Rule 51(b) to say *Gall* error must be preserved by a *Gall* specific objection, telling the sentencing judge exactly why he could not employ an Extraordinary Circumstances Test. (Opp. Br. 14). Of course, the practical problem with that argument is that Mr. Bain's sentencing took place four months before the *Gall* decision. Rule 51(b) does not require a trial lawyer to make arguments that educate a judge

as to how he is supposed to reach a decision. The rule requires the lawyer to tell the judge what sentence he wants. From a legal viewpoint, the dissent of Judge Clay in *Vonner*, explains exactly why this Court's requirement for reasonableness in sentencing does not allow a procedural cat-and-mouse game in the pursuit of justice:

> Moreover, by transforming *Booker's* required reasonableness review into mere plain error review when a defendant does not raise a separate objection to the "procedural reasonableness" of his sentence at the time of sentencing, the majority evades the responsibility, imposed on us by *Gall*, to insure that a defendant is afforded the opportunity to have his sentencing arguments considered and is given an adequate explanation of the reasons for the deprivation of his liberty. *See Gall* 128 S. Ct. at 597. *Vonner*, 516 F.3d at 406.

The "procedural reasonableness" preservation game is exactly what Judge Benton disapproved in his concurrence in the instant case. When the sentencing judge errs in his procedure in considering the Guidelines, the whole process is tainted and the appellate court cannot review the result for reasonableness. Judge Benton wrote:

> When Bain requested the 60-month sentence, the district court stated, "I can't do that, . . . If the Court gives [defendants] more than 45 or 50 percent off for putting their life at risk, the Court of Appeals reverses that as

> an unreasonable sentence." The district court did not seriously consider Bain's arguments for a 60-month sentence; therefore the entire § 3553(a) explanation is tainted by the *Gall* error.
>
> * * *
>
> Substantive review under *Gall* requires this court to defer to the district court's *unrestrained* opinion about what sentence is "sufficient but not greater than necessary," and the reasons therefor.
>
> * * *
>
> Since this court has no reliable basis for substantive review, this sentence should be reversed and remanded for resentencing in order to fulfill the mandate of *Gall*. *Bain*, 537 F.3d at 886 (Benton, J., concurring) (emphasis supplied).

Judge Benton then reeled off citations for five cases where the Eighth Circuit reversed sentences for procedural error. On two of those, the judge specifically noted there was no analysis for harmless error, plain error or substantive reasonableness, but simply a remand for a sentencing employing proper procedures. Judge Benton also cited another Eighth Circuit concurrence that said procedural error "thwarts reasonableness review – that is, it cuts off our review process before we even reach the issue of reasonableness." *U.S. v. Vickers*, 528 F.2d 1116, 1122-23 (8th Cir. 2008). *U.S. v. Bain*, 537 F.3d 876, 885-886 (8th Cir. 2008). When Mr. Bain said the

circuits "are all over the board with differing standards of review," Mr. Bain was referring to the litany of cases Judge Benton pointed out within the Eighth Circuit, and the deep split in the Sixth Circuit in *Vonner*. The Sixth Circuit split was the one Judge Moore's dissent described as "a growing split that certainly merits attention of the Supreme Court." (Pet. 31-33).

The pick-and-choose methods employed in a "specific objection" reading of Rule 51(b) does not lend itself to the procedural and substantive demands for reasonableness in *Booker* and *Gall*. The absurdity of manipulating those devices is shown quite simply within the confines of the Eighth Circuit's contradictory analyses in the instant case. When the judge plainly stated his misunderstanding of *Rita*, the panel presumed he knew the law, and did nothing wrong. When the panel then decides the judge did violate *Gall*, the majority decides the defense lawyer should have pointed out the defect for the judge as it would be explained by this Court four months later.

CONCLUSION

Sentencing decisions infected with *Rita* and *Gall* errors must be deemed unreasonable and remanded for a judgment determined by proper procedure. For that reason, a Writ should issue to allow this Court to explain the proper administration of justice.

Respectfully submitted,

KENT A. SIMMONS
Attorney for Petitioner